No. 40.

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Supreme Court of the United States.

EDWARD E. O'BRIEN

against

BRICE ALAN MILLER AND OTHERS,
Libellants.

No. 40.
October Term, 1897.

Memorandum on behalf of libellants in opposition to O'Brien's motion to amend decree.

First. The proctor for the shipowner falls into the error of treating the libellants' action as one for unliquidated damages. The action was for contribution to the expenses of the port of refuge, all of which expenses had been paid by the cargo-owners.

The case was one of general average, and it was the duty of the master and shipowner to have an adjustment made up.

Heye vs North German Lloyd 33 Fed. Rep. 60, 71

This duty was not performed by either shipowner or master, to whom the details of all expenses were known. The shipowner and master having failed in their duty, the cargo-owners made as good an adjustment as they could.

Even after presentation of such adjustment, neither the shipowner nor master put forward a corrected statement, nor did they make any tender.

Under the interlocutory decree of the District Court a new adjustment was prepared, based upon the fuller information acquired in the course of litigation.

The amount determined by the adjustment was bare remuneration for money which the cargo-owners legally paid for account of the shipowner.

Second. There is no merit in the shipowner's suggestion that the shipowner should pay only one-half of the amount of the ship's contribution, because of his having been insured to the extent of one-half. The pleadings afford no support for any such claim.

Whatever the shipowner's proctor may have known, it is certain that the shipowner knew, from the moment he was sued in 1887, that he was subject to reimburse the cargo-owners, and he was put upon notice to maintain open relations with his underwriters.

The record shows that accounts were kept open between them to June 28, 1886 *(O'Brien 25)*, and there is no statement made by the shipowner, in his several applications to the Courts, that accounts have ever been closed. The only statement is that of the proctor, who does not allege any fact of prejudice, but only an inference of prejudice *(page 51)*.

Third. The motion of the shipowner to amend the decree should be denied, and the motion of the libellants to amend the decree in respect of interest should be granted.

WILHELMUS MYNDERSE,
Proctor for Libellants.